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IN THE

Supreme Court of the United States

October Term, 1963
No. 862

BERNARD REICH and SYLVIA REICH, Depositors and members of BEVERLY HILLS FEDERAL SAVINGS & LOAN ASSOCIATION, individually and in behalf of BEVERLY HILLS FEDERAL SAVINGS & LOAN ASSOCIATION and the other depositor-members of said Association, similarly situated,

Petitioners,

vs.

EUGENE WEBB, JR., MARGUERITE R. WEBB and BEVERLY HILLS FEDERAL SAVINGS & LOAN ASSOCIATION,

Respondents.

Petition for a Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District.

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vs.

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Respondents.

Petition for a Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District.

Petitioners pray that a writ of certiorari issue to review the judgment of the District Court of Appeal of the State of California, Second Appellate District, entered in the above-entitled case on August 5, 1963.

Citations to Opinions Below.

The minute order of the trial court, the Superior Court for Los Angeles County, State of California [C. T. 37] is unreported. The opinion of the District Court of Appeal for the State of California, Sec-

ond Appellate District, printed in Appendix B hereto, *infra*, pages 4-13; is reported in 218 Advance California Appellate Reports 910.

Jurisdiction.

The order and judgment of the District Court of Appeal were entered on August 5, 1963 (Appendix B, page 4). A petition for hearing with respect thereto in the Supreme Court of California was denied on October 1, 1963 [R. 1] Petitioners' time within which to file the instant petition was extended by order of this Court on February 3, 1964, to February 25, 1964. The jurisdiction of this court is invoked under 28 U. S. C. §1257-(3).

The central issue in this action relates to the dismissal of petitioners' claims, as depositor-members of a Federal Savings & Loan Association, against former directors of that Federal Savings & Loan Association for breach of fiduciary duty.

Petitioners asserted in their complaint that these former directors had sold proxies which they held from members of the Savings and Loan Association and had sold their directorships for $1,500,000.00, and that this act constituted a breach of fiduciary duty and petitioners, by way of a derivative action, were entitled to recover these moneys and any damages suffered on behalf of the association since the association itself refused petitioners' demand that it seek recovery against former directors. The relif sought by petitioners was the imposition of a constructive trust on the moneys received by the former directors and the recovery of actual and punitive damages. The former directors, the Webb respondents, and the association demurred

to petitioners' complaint. The sole grounds upon which the demurrer was sustained, without leave to amend, was that under a Federal statute, the Home Owners Loan Act of 1933 (12 U. S. C. Section 1464 *et seq.*) that former directors were immune from suit until petitioners had exhausted a remedy asserted to be available to them before the Federal Home Loan Bank Board under that statute [C. T. 37].

The trial court and the District Court of Appeal each based their decision dismissing petitioners' complaint upon a construction of this Federal statute, *i.e.*, the Home Owners Loan Act of 1933 as amended (hereinafter the Act), holding in substance, that in this action it created an immunity for the benefit of respondents. The trial court held "exhaustion of administrative remedies is a jurisdictional prerequisite to resort to the courts in any matter relating to the operation and regulation of any Federal Savings and Loan Association. The authority (as well as the responsibility) for such regulation lies with the Home Loan Bank Board" [C. T. 37].

The District Court of Appeal affirmed the dismissal of petitioners' complaint upon the same grounds. The Court stated: "Since the rules and regulations of the Home Loan Bank Board contain detailed provisions regarding the Government of such internal affairs, the plaintiffs are thereby afforded administrative remedies. It does not appear from the amended complaint that plaintiffs have exhausted such remedies. There is nothing in the record to indicate that they could have amended to include such an allegation. The court did not err in sustaining the demurrers without leave to amend. The judgment is affirmed" (App. B, p. 13).

Petitioners filed a petition for hearing in the Supreme Court of California which raised precisely the same points. Thus, as their points I and II respectively, petitioners asserted:

"I.

The Federal Home Owners Loan Act of 1933 does not regulate and the board has not adopted or promulgated any regulation which prohibits directors or officers of a Federal Savings and Loan Association from diverting the assets of the association, or its members, to their own private benefit, or covering generally the subject of breach of fiduciary duty. The board has not provided for a hearing for any party claiming to be aggrieved or injured by such acts . . . (Petition for Hearing, p. 8)

"A. Each of the three separate causes of action allege a separate breach of fiduciary duty and misappropriation and diversion of assets . . . (Petition for Hearing, p. 8).

"B. There are no provisions in the act or the board regulations covering the prohibition or regulation of the diversion of assets of an association, or its members by directors of an association, or imposing any liability therefor . . . (Petition for Hearing, p. 11).

"C. The Court failed to designate any provision of the act or the board's regulations which would relate to any of petitioners' three causes of action . . . (Petition for Hearing, p. 14).

"D. The specific hearing provision of the regulations and the act completely negative any requirement for an administrative hearing prior to judicial action in the instant case . . . (Petition for Hearing, p. 22).

II.

"A litigant is not obligated to seek administrative relief from the board if a fair construction of the board's rules and its governing statute reveals that the particular subject matter of the complaint is not arguably encompassed by the regulations or the statute. The decision below is in conflict with decisions of at least one other California Appellate decision and with governing federal law on this basic proposition of law . . . (Petition for Hearing, p. 28)

"B. Governing federal decisions and federal policy preclude the holding that petitioners have an administrative remedy before the Federal Home Loan Bank Board or that a proceeding before that board is a condition for asserting petitioners' right that fiduciaries of a federal savings and loan association be held accountable for their violation of fiduciary duty . . . (Petition for Hearing, p. 32)"

The petition for hearing in the Supreme Court of the State of California was denied [R. 1].

It is clear from the foregoing that the substantial issue below, indeed the only issue, was the decision by the California courts construing a Federal statute, *i.e.*, the Act, in such a manner as to create an immunity as respects former directors of a Federal Savings & Loan Association against petitioners' derivative action upon the grounds that this Act provides an adequate and available administrative remedy which petitioners were required to exhaust prior to suit. This Court, therefore, has jurisdiction of this petition, under 28 U. S. C. Sec. 1257(3).

Questions Presented.

1. Does an administrative proceeding before the Federal Home Loan Bank Board under 15 U. S. C. §1464 (d)(1) constitute an appropriate federal administrative remedy as respects a claim by depositor-owners of a Federal Savings and Loan Association that former directors sold depositors' proxies and the association directorships for money for their private benefit, and seeking a money judgment for the association and its members for that breach of fiduciary duty, where it is established by the Act and the regulations that (1) the board has not adopted any regulations as to the claimed fiduciary duties of directors to the association and its members and therefore has no jurisdiction over the subject matter of petitioners' claim; (2) that the board is restricted by statute to actions against the association only and cannot sue former directors and therefore has no jurisdiction over the parties against whom petitioners seek relief, and (3) *a fortiori*, the board has no power under this section to recover from former directors of an association a money judgment for the benefit of the association or its depositor-owners.

2. Does the power of the Federal Home Loan Bank Board to appoint a conservator or receiver for an association upon the specific grounds enumerated in 15 U. S. C. §1464(d)(2) constitute an appropriate administrative remedy, thus barring petitioners' derivative claim now which asserts that former directors sold proxies and directorships for their private gain, where the derivative claim by the depositor-owners is based solely upon past acts only, by former directors in their individual capacity, for *ultra vires* acts only, and no claim whatsoever is made against the association itself

and where the appointment of a conservator or receiver for the association is irrelevant to petitioners' claim and is neither the requested nor the desirable relief sought by petitioners.

Statement.

When a group of individuals hereinafter referred to as the Lytton group obtained control of Beverly Hills Federal Savings and Loan Association, hereinafter referred to as the Association, a mutual Federal Savings and Loan Association, it was discovered that respondents Eugene Webb, Jr. and his wife, Marguerite Webb, two dominant officers and directors of the Group who then controlled Beverly Hills Federal had personally profited in the amount of $1,500,000.00 in connection with the transfer of proxies, directorships and control to the Lytton group. It was further discovered that $15,000,000.00 in loans were immediately and improperly purchased from the Lytton group by the Association after the Lytton group obtained control. When Appellants Bernard Reich and Sylvia Reich, husband and wife who were depositor members of the Association, made demand upon the directors of the Association that the Association file suit against the Webbs and their group to recover the $1,500,000.00 as an asset of Beverly Hills Federal which had been fraudulently diverted by the Webbs through their breach of fiduciary duty and to recover the $15,000,000.00 improperly paid for loans by the Association and to recover for diversion of other Association assets as well as damages suffered by the Association at the hands of the Lytton group, the Directors of the Association declined to act.

Petitioners' first amended complaint was captioned "First Amended Complaint for Declaration of a Con-

structive Trust, Accounting, General Damages, and Punitive Damages." The complaint sets forth three causes of action.

1. A cause of action asserting that respondents Eugene Webb, Jr. and Marguerite R. Webb and certain fictitiously named defendants, as officers and directors of Beverly Hills Federal Savings & Loan Association, breached their fiduciary duties to the Beverly Hills Federal Savings & Loan Association and to the members of Beverly Hills Federal Savings & Loan Association by diverting to defendant Southland Mortgage Corporation and to themselves corporate opportunities and expectancies which were the property of Beverly Hills Federal Savings & Loan Association [C. T. 20-24].

2. A cause of action asserting that respondents Eugene Webb, Jr. and Marguerite R. Webb, and certain fictitiously named defendants as officers and directors of the Beverly Hills Federal Savings & Loan Association and as holders of voting proxies from members of said association, had breached their fiduciary duties to the Beverly Hills Federal Savings and Loan Association and to the members of said Association by selling their offices as directors and selling their voting proxies which they had from members of Beverly Hills Federal for the sum of $1,500,000.00, said sale constituting a sale of control of Beverly Hills Savings & Loan Association [C. T. 25-27].

3. A cause of action asserting that defendant Bart Lytton as an officer and director of Beverly Hills Federal Savings & Loan Association, had breached his fiduciary duty to Beverly Hills Federal Savings & Loan Association and to the members thereof, acting in con-

cert with the defendant Lytton Financial Corporation and Lytton Savings and Loan Association, by causing Beverly Hills Federal Savings and Loan Association to purchase certain notes and deeds of trust approximating $15,000,000.00 in face amount and receiving profits, fees and other monetary consideration resulting in damage to Beverly Hills Federal Savings and Loan Association and to the members thereof [C. T. 27-29].

As respects each of these three causes of action it was alleged that petitioners Bernard Reich and Sylvia Reich sued (1) individually and as depositors and members of Beverly Hills Federal Savings and Loan Association and in behalf of the other members of said association similarly situated and (2) in behalf of Beverly Hills Federal Savings and Loan Association [C. T. 20, 22].

Insofar as the causes of action asserted were "derivative" causes of action in nature, it was alleged that prior to suit a demand had been made upon the present Board of Directors of Beverly Hills Federal Savings and Loan Association to assert these claims against the defendants herein and that the demand had been refused [C. T. 24, 26, 28].

The relief sought was:

(1) A judgment that respondents Eugene Webb, Jr. and Marguerite R. Webb held in constructive trust for the use and benefit of Beverly Hills Federal Savings and Loan the sum of $1,500,000.00.

(2) A judgment that all of the assets, profits, net worth and capital stock of Southland Mortgage Corporation were the property of Beverly Hills Federal and that defendant Lytton Finance Corporation and

Bart Lytton hold said property, assets, proceeds, net worth and capital stock in constructive trust for respondent Beverly Hills Federal.

(3) A judgment that defendants Lytton Finance Corporation, Lytton Savings and Loan and Bart Lytton hold in constructive trust for the use and benefit of Beverly Hills Federal all of the notes, deeds of trust and other assets transferred by Beverly Hills Federal after said defendants obtained control of Beverly Hills Federal.

(4) That the respondents Webb account to Beverly Hills Federal for all proceeds, benefits and advantages obtained by them as alleged.

(5) For general damages in favor of Beverly Hills Federal in the sum of $1,500,000.00 and punitive damages in the sum of $500,000.00.

(6) For plaintiffs' costs and expenses, including reasonable attorneys fees.

(7) For general relief [C. T. 29].

A demurrer to each cause of action in Petitioners' First Amended Complaint was filed by the Respondents Eugene Webb, Jr. and Marguerite R. Webb and Respondent Beverly Hills Federal Savings and Loan Association. The demurrer was sustained without leave to amend upon the grounds that "exhaustion of administrative remedies is a jurisdictional prerequisite to resort to the courts in any matter relating to the operation and regulation of any federal savings and loan

association. The authorities (as well as the responsibility) for such regulation lies with the Home Loan Bank Board" [C. T. 37]. The complaint was dismissed without leave to amend as against all defendants [C. T. 38]. Petitioners appeal as respects the Webb respondents and respondent Beverly Hills Federal Savings and Loan Association was denied by the District Court of Appeal of the State of California, Second Appellate District upon the same grounds (Appendix B, p. 13). The Supreme Court of California denied a hearing [R. 1].

The court's opinion below held squarely that because of the broad powers of the Federal Home Loan Bank Board to prescribe rules and regulations for the organization, incorporation, examination, operation and regulation of federal savings and loan associations and because the rules and regulations of the Board contain detailed provisions regarding the government of internal affairs of the respondent association that thereby petitioners had an available and adequate administrative remedy which they were obliged to exhaust first before resorting to the state courts of California to protect their economic interests in a federal association.

REASONS FOR GRANTING THE WRIT.

I.

The Decision of the Court Below in the Instant Case Decides an Important Federal Question Having Substantial Significance to the Administration of the Home Owners Loan Act of 1933, 48 Stat. 132 and to the Rights of All Depositor-Members of Federal Savings and Loan Associations.

The essence of petitioners' second cause of action, the critical cause of action in the complaint, is that faithless fiduciaries have profited by the sale of rights which, in a mutual association, belong to the depositor-members. Since the present officers and directors who paid the money and bought the proxies and directorships, not unexpectedly, have refused to sue, the depositor-owners of the association can only preserve their rights through the traditional derivative action by suit in either the state or federal court under the general law. Whether the right to sue derivatively by members of a federal savings and loan association arises under the state law or arises from the inter-play of federal statutes (see *Dietrich v. Greaney*, 309 U. S. 190, 200-201 (1940) and *D'Oench, Duhme and Co. v. F.D.I.C.*, 315 U. S. 447, 469-470 (1942)), the *exercise* of that right of self preservation, in an economic sense, is completely frustrated now by a rule of law in the instant case that depositor-owners of an association must first sue in Washington.

The erroneous nature of this rule is dramatically demonstrated by the fact that the agency to which the court below has directed petitioners, as a pre-condition of suit, has no power to adjudicate the substance of petitioners' claim, or to obtain any relief against the

parties sued by petitioners. In short, the purported administrative remedy upon which the court below dismissed petitioners' claim is non-existent.

This is true for the following reasons:

1. The board has not adopted any regulation covering the claimed breach of fiduciary liability by directors to their association either generally or specifically and it has not been given the statutory power under its hearing procedures to commence administrative proceedings against former directors of an association.

2. *A fortiori,* the board cannot give the petitioners the only relief they want, *i.e.,* a judgment for all the financial benefits which the faithless fiduciaries have acquired through their breach of trust and the damages, actual or punitive, to which the association is entitled.

A. There Are No Provisions in the Act or the Board's Regulations Governing the Prohibition or Regulation of the Diversion of Assets of an Association or Its Members by Directors of an Association or Imposing Any Liability Therefor.

The Home Owners Loan Act of 1933, 48 Stat. 132, 12 U. S. C. A. Sec. 1461 *et seq.* provides that:

> "The board is authorized, *under such rules and regulations as it may prescribe* to provide for the organization, incorporation, examination, operation and regulation of associations to be known as 'federal savings & loan associations'." (12 U. S. C. A. § 1464(a) (emphasis added).

The statute further provides that

> "The board shall have the power to enforce this section and rules and regulations made hereunder". (12 U. S. C. A. § 1464(d)(1).)

Nothing in the remaining provisions of the Act itself expressly or by implication covers or regulates the fiduciary duties of directors to the association.

Turning to the regulations, which appear in the Code of Federal Regulations, Title 12, Chapter V, Subchapter C, §§ 541-555, it is immediately evident that they contain no regulations whatsoever covering, expressly or by implication, the breach of fiduciary duty by a director who sells control of the association by sale of proxies and directorships for his own private benefit. Respondents have never contended that such provisions appeared in the regulations and the court's opinion below, except by reference to statements that the board has exercised "broad powers of regulation" does not cite a single provision of the Act or regulations on this subject.

It is not surprising that there are no provisions of the Act or the regulations which cover such breaches of fiduciary duty by a director to an association, since under the Act, as under the federal statutes creating national banks, there are vast areas of duties and rights which are left to enforcement in the state courts under general law. *National Bank v. Commonwealth*, 76 U. S. 353. Prather, Applicability of State Law and Federal Law to Federal Financial Institutions, U. S. Savings and Loan League, Legal Bulletin, 1954, 55.

In 30 years of enforcement of the act the board had never sued a director for breach of fiduciary duty and had never commenced an administrative proceeding against a director for breach of fiduciary duty.

Moreover, the Administrative Procedure Act, 5 U. S. C. § 1002(a)(3) provides that: "Every agency shall state and currently publish in the Federal Register

substantive rules adopted as authorized by law." All of the board's hearings are subject to the Administrative Procedure Act (12 U. S. C. A. § 1464(d)(1)). Unpublished rules or regulations are void and unenforceable. *Hotch v. United States* (C. A. 9, 1954), 212 F. 2d 280; *cf. Federal Home Loan Bank Board v. Greater Delaware Valley Federal Savings and Loan Association* (C. A. 3, 1960), 277 F. 2d 437. Thus, since the board has never adopted regulations covering the fiduciary duties at issue here and without adoption and publication such regulations would be void, the board lacks jurisdiction over the substantive liability asserted by petitioners against the respondents Webb.[1]

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[1] 12 U. S. C. A. Section 1464(d)(1) commences with the following language:

> "The Board shall have power to enforce this Section and rules and regulations made hereunder. In the enforcement of any provision of this Section or rules and regulations made hereunder, or any other law or regulation, and in the administration of conservatorships and receiverships as provided in Section (d)(1) hereof, the Board is authorized to act in its own name and through its attorneys".

It cannot be rationally argued that this reference that the Board may sue in its own name and through its own attorneys in the enforcement

> "of any provisions of this Section or rules and regulations made hereunder, or any other law or regulation"

is, without more, a grant of power to the Board to enforce, literally, any other law or regulation. Had this been the intent of the language the words would have been added at the end of the first sentence and not in the middle of the second one. Moreover, this provision is clearly subordinate to 12 U. S. C. A. 1464(a) which provides that the Board is authorized

> "under such rules and regulations as it may prescribe to provide for the organization, incorporation, examination, operation and regulation of associations . . ."

To comply with the Administrative Procedure Act the Board is required to publish the regulations which it intends to enforce. Any inference that the Board has been given carte blanche power to enforce without notice all of the police regulations of the 50 states and the United States is contrary to the basic constitutional principles prohibiting such delegation of power without

Under the Act and the board's regulations, it is clear that the board has power to proceed, in any event, *only* against associations in their corporate capacity. The Board has *no power to sue former directors of an association in their individual capacity.*

The relevant provisions of the Act on this point are set forth at 12 U. S. C. A. 1464(d)(1). At every relevant point jurisdiction is given over the *association* in its corporate capacity only. Thus the hearing procedures are described as follows:

1. The adoption of a formal resolution stating an alleged violation of law or regulation with notice going to the *association.*

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standards. (*Schechter Poultry Corp. v. United States*, 295 U. S. 495 (1935).

Any suggestion that the adoption of 12 U. S. C. 1464(d)(1) was intended to lessen rather than to tighten the standards for administrative action by the Board is completely destroyed by the legislative history of the adoption of that section. Thus that legislative history shows:

1. That prior thereto the Board's only means of regulation was the appointment of a receiver.

2. In the famous *Long Beach Federal Savings and Loan Association* case the Board appointed a receiver, without notice, for a solvent institution and was thereafter subject to great criticism by members of Congress.

3. New standards were proposed for the appointment of conservators and receivers and their appointment was made subject to review under the Administrative Procedure Act.

4. The Board was given power to enforce its rules and regulations by administrative proceedings also subject to the Administrative Procedure Act.

5. The "industry" reviewed and accepted the proposed statute, a result hardly likely if the language adopted was intended to permit the Board carte blanche, without publishing notice, as to the rules and regulations which it could enforce. (See Senate Hearings, Committee on Banking and Currency, 83rd Congress, 2d Session, pages 83, 84. Also see, House Hearings, Committee on Banking and Currency, 83rd Congress, 2d Session, pages 204, 205.)

2. The *association* is given 30 days to correct the violation of law or regulation and to perform any legal duty.

3. If the association does not comply the Board sends the *association* 20 days written notice of the charges and a time and place for hearing.

4. The place of the hearing is the federal judicial district of the *association* unless it consents to another place. Appeals lie as provided by the Administrative Procedure Act.

5. Either the Board or the *association* have the option, after notice of the alleged violation, to apply to a United States District Court for the district where the association is located for a declaratory judgment, an injunction or other relief.

6. The Board may apply to the district court of the district where the *association* affected has its home office for the enforcement of any Board order.

7. The Board is made subject to suit by any *association.*

Thus the statute is clear that hearing procedures are between the Board and association only.

If this were not sufficient the Board's regulations concerning hearings relating to compliance with "law and regulations" adopted the same mechanics, *i.e.*, a hearing between the Board and the association only. Thus Section 542.3 of the regulations (12 C. F. R. Chapter V, sub-chapter C, Section 542.3) repeats the basic provision of 12 U. S. C. A. Section 1464(d)(1) and in every case the procedure is between the Board and the association only. There is even added a provision with respect to costs, "the cost of any hearing pur-

suant to the provisions hereof, as determined by the Board, may be assessed against the federal association party to such hearing unless it is found that such federal association was not guilty of the alleged violation of laws, regulations or duty."[2]

From the foregoing it appears to be clearly established that in the instant case the Board has no jurisdiction, in the classical sense, as respects the substantive allegations of the petitioners' complaint or as respects the parties from whom petitioners seek relief. This fact appears from the very face of the Act and the regulations.

But if the Board has no jurisdiction in this classical sense petitioners were entitled to proceed with their suit without diversion into the blind alley of a void and unwarranted administrative proceeding.

II.

The Decision Below Is in Direct Conflict With Applicable Decisions of This Court.

This court has long held that where claimed alternative administrative proceedings are inappropriate or inadequate, such proceedings need not be exhausted prior resort to the courts. The decision this term in *William*

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[2]Section 542.2 of the regulations (12 C. F. R. Chapter V, sub-chapter C, Section 542.2) permits application for hearing by any person "who has made an application or petition to the Board pursuant to any provision of parts 543, 544, 545 or 546 of this sub-chapter." Those sub-chapters are each admittedly irrelevant to any of the claims in this action. This section also provides that, "the Board may order a hearing in connection with the consideration of any matters arising under any provision of the rules and regulations of this sub-chapter, whether or not any request therefor has been made by any person." Since, as noted above, the Board has not adopted any regulations covering the claims in this action expressly or by implication, this provision is irrelevant.

L. Greene v. United States, ... U. S. ..... (1964) is directly in point. In *Greene supra*, a defense employee who had been wrongfully discharged under security clearance procedures which this court held constitutionally unauthorized, sued for recovery of back wages under a 1955 administrative rule. The court of claims held that petitioner was barred for failure to exhaust administrative remedies under an administrative procedure and rule which had been newly adopted in 1960. This court held that the new rule did not provide a reasonable basis for reviewing petitioners' rights under the prior rule. Therefore, the court said, "since in this case the only available administrative procedure entitled the burden of presenting the claim under an inapplicable and substantially revised regulation, that procedure must be regarded as inappropriate and inadequate and therefore need not be pursued." *William L. Greene v. United States*, ... U. S. ..... at p. ..... (1964).

The *Greene* case, *supra*, was preceded by at least four other decisions of this court applying the same principal. Thus, in *Skinner and Eddy Corp. v. United States*, 249 U. S. 557, 562-563; it was held that courts have the power to proceed without the initiation of an administrative proceeding where the agency has exceeded its statutory powers so that its determination would be void.

In *United States Alkali Export Association v. United States*, 325 U. S. 196 (1945) it was argued that as respects an action under the antitrust laws by the United States, that an administrative hearing before the Federal Trade Commission was required under the Webb-Pomerene Act (40 Stat. 516, 15 U. S. C. Secs. 61, 62,

65). This court denied this contention. The Court said:

> "The only function of the Federal Trade Commission * * * is to investigate, recommend and report. It can give no remedies. It can make no controlling finding of law or fact. Its recommendation need not be followed."

In *Township of Hillsborough v. Cromwell*, 326 U. S. 620, 625-626 (1946), the exhaustion requirement was dispensed with because of inadequacy of the remedy where an analysis of the remedy showed that, "There is such an uncertainty" as respects the remedy as "to make it speculative."

In the instant case, the supposed administrative remedy before the Board is inadequate and inapplicable within the standards laid down in each of the foregoing decisions. Thus, as we have noted above, by reason of the board's failure to adopt any regulations concerning the substantive subject matter of petitioners' claim and by reason of the board's statutory restriction to proceedings against the association only, it has no power in the premises. It can make no controlling finding of law or fact. Any recommendation it might make need not be followed. *United States Alkali Export Association v. United States, supra.*

For the same reason, the existing regulations of the board are "inapplicable" to petitioners' claim, see *William L. Greene v. United States, supra.* Certainly the least that can be said in this case is that there is "such uncertainty concerning the remedy before the board to

make it speculative." *Township of Hillsborough v. Cromwell, supra.*

> "Impossibility or improbability of obtaining adequate relief by pursuing administrative remedies is often a reason for dispensing with the exhaustion requirement." *3 Davis, Administrative Law Treatise* (1958), § 20.07, cited with approval by the court in *William L. Greene v. United States,* ..... U. S. ..... (1964).

Certainly it cannot be argued in this case that the power of the board to appoint a conservator or receiver over the affairs of the association under 14 U. S. C. 1264 (d) (2) is an adequate or applicable administrative remedy. This is not the relief which petitioners seek. In fact, it would be the most destructive remedy which could be imagined. Appointment of a receiver over a solvent financial institution, with the likelihood of "runs" on deposits, etc., in order to obtain money relief from faithless fiduciaries would be a kind of administrative "over-kill" which would be unconscionable and self-destructive of the rights of the very depositors whom petitioners represent.

Greene v. United States, supra, clearly establishes that petitioners are not required to make a choice between the protection of their economic rights and proceedings under irrelevant regulations.

In *Greene v. United States, supra,* the petitioners sought only money damages, not reinstatement to current, authorized status with the Defense Department. The court held that administrative review under a new regulation which set out standards for current authorized status, not requested by petitioner, was irrelevant, and that therefore such review was not required to be ex-

hausted prior to judicial action. Similarly in the instant case petitioner seeks money damages and the imposition of a constructive trust for breach of fiduciary duty by former directors of an association. The relief is sought for *past* acts and for actions which were *ultra vires* as to the association. The substantive standards for the appointment of a conservator or a receiver, as set forth in 12 U. S. C. Section 1464 (d)(2) are standards which have to do with current activities by the association which justify the most drastic remedy. Just as in *Greene v. United States, supra*, those standards are irrelevant to petitioners' suit for a money judgment. Therefore, just as in *Greene v. United States, supra*, petitioners are not required to seek appointment of a receiver or conservator before proceeding with their litigation in the state court under general law.

The decision below is also contrary to and in conflict with this court's decisions in *Agnes K. Head, dba Tea Publishing Co. v. New Mexico Board of Examiners in Optometry*, ... U. S. ..... 83 S. Ct. ..... (1963) and *Colorado Anti Discrimination Committee, et al. v. Continental Airlines, Inc.*, ... U. S. ....., 83 S. Ct. ..... (1963). It is clear that the holding of the court below that petitioners were required to exhaust purported remedies before the board was based upon the proposition that "since the rules and regulations of the Home Loan Bank Board contain detailed provisions regarding the government of such internal affairs, the plaintiffs are thereby afforded administrative remedies" which they are required to exhaust. The court below clearly held it was unnecessary to determine whether the *specific* claims against the *specific* parties sued by petitioners were the subject of regulation by the Federal

Home Loan Bank Board. The court held that the *general power of regulation* which had been generally exercised by the board deprived the California court of jurisdiction to grant petitioners' relief.[3] In *Agnes K. Head, dba Lea County Publishing Co. v. New Mexico Board of Examiners in Optometry*, ... U. S. ....., 83 S. Ct. ..... (1963), the issue was whether a state's regulation of radio advertising "by any means" was precluded or preempted by the licensing power of the Federal Communications Commission. In analyzing the issue this court noted expressly:

> "In dealing with the contention that New Mexico's jurisdiction to regulate radio advertising has been preempted by the Federal Communications Act, we may begin by noting that the validity of this claim cannot be judged by reference to broad statements about the 'comprehensive' nature of Federal regulation under the Federal Communications Act. The question whether Congress and its commissions acting under it have so far exercised the

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[3]The significance of this purported rule of law to the court below is seen by its emphasis on such statements, taken from other California decisions, that

> "the board has provided extensively detailed rules for the government of each and every act of the internal affairs of associations and under the law fully adequate powers are granted to the board for the enforcement of its orders, including even the right to take over exclusive judgment of the association for failure or refusal to obey the board's orders."

From another case the court quoted:

> "The rules and regulations of the board are comprehensive, explicit, and govern the operation of Federal savings and loan associations from their inception to their dissolution. They have the force and effect of law and are binding upon an association, its board of directors and its members."

exclusive jurisdiction that belonged to it as to exclude the state, must be answered by a judgment upon the particular case. Statements concerning the 'exclusive jurisdiction' of Congress beg the only controversial question: Whether Congress intended to make its jurisdiction exclusive. *California v. Zook*, 336 U. S. 725, 731. *Kelly v. Washington*, 302 U. S. 1, 10-13. In areas of the law not inherently requiring national uniformity, our decisions are clear in requiring that State statutes, otherwise valid, must be upheld unless there is found such actual conflict between the two schemes of regulation that both cannot stand in the same area (or) evidence of a congressional design to preempt the field. *Florida Avocado Growers v. Paul*, 373 U. S. 132."

In *Colorado Anti-Discrimination Commission, et al. v. Continental Airlines, Inc.*, ... U. S. ..... 83 S. Ct. ..... (1963) it was contended that Colorado's anti-discrimination law was preempted by reason of "broad authority" granted to the Civil Aeronautics Board, which authority had indeed been exercised by extensive regulation. This court nevertheless held Colorado's statute enforceable. Thus the court said

"notwithstanding this broad authority, we are satisfied that Congress in the Civil Aeronautics Act, and its successor, had no express or implied intent to bar state legislation in this field, and that the Colorado statute, at least so long as any power of the Civil Aeronautics Board may have remained 'dormant and unexercised' will not frustrate any part of the purpose of the Federal legislation."

The *Head* case, *supra*, and the *Colorado Anti-Discrimination* case, *supra*, both concern agencies with the power of economic life and death, *i.e.*, the power to give or refuse a franchise. This is true of the board as well. The *Head* and *Colorado Anti-Discrimination* cases involve statutes which confer upon the respective agencies "board general powers" and the agencies have exercised this power by establishing "extensive detailed regulations". This is also true of the Federal Home Loan Bank Board. But in these decisions of this court it is established that rights or duties under state law, in the face of these federal powers, must be determined upon the basis of the particular facts as to the particular right or claim and its relationship to the purposes of Congress in enacting the regulatory scheme involved.

This standard was rejected by the court below and its decision is squarely contrary to the foregoing decisions by this court.

If the principles of the *Head* and *Colorado Anti-Discrimination* cases, *supra*, had been applied, a contrary result would have been required.

Thus it cannot be argue that the enforcement by California of fiduciary duties of directors of a federal savings and loan association is in conflict with the Home Owners Loan Act or denies any rights granted by that act or that such enforcement would stand as an obstacle to the full effectiveness of the Federal statute. On the contrary, these are financial institutions and the imposition of strict fiduciary requirements is not only in accordance with Congressional policy, but is certainly expected by every depositor in either a bank or a savings and loan association. There is not a shred of evidence that the Congressional enactment of the

Home Owners Loan Act was intended to oust the right of California courts to give protection to California depositors in Federal savings and loan associations against faithless fiduciaries.

It should be noted that the charter forms for Federal savings and loan associations have always included as one of the objects and powers, the power "to sue and be sued, complain and defend in any court of law or equity". (12 C.F.R. chapter V, sub-chapter C, § 544.1 (a), paragraph 3, and § 544.1 (b), paragraph 3.

Since the decision of this court in *Bank of United States v. Deveaux, et al.*, 5 Cranch 61, 3 L. Ed. 38 (1809), it has been established doctrine that the presence of that provision in a charter of a corporation organized by an agency of the United States did *not* give the chartered corporation the right to sue in the Federal courts. Thus, it has been the expected result that the state courts would be the forum in which Federally created corporations, including national banks and Federal savings and loan associations, would litigate their day-to-day claims and protect their property rights. That protection has never been deemed to be inconsistent with the Congressional plan of regulation of these financial institutions. Had the court below applied this rule of law, it would have found petitioners' claim consistent with the Federal regulatory scheme.

The holding below in the instant case is therefore clearly contrary to the applicable decisions of this court.

III.

The Decision Below Is in Conflict With a Decision of the Court of West Virginia and the Decision of the Court of Appeals for the Third Circuit.

In *Daurelle v. Traders Federal Savings and Loan Association* (W. Va. 1958), 104 S. E. 2d 320, the court held, despite the existence of all of the board regulations, that judicial action by way of mandamus to force an association to permit a member to see the membership list for the purpose of soliciting proxies was not barred by any requirement for the exhaustion of administrative remedy, since there was no available administrative remedy as respects that claim.

In *Federal Home Loan Bank Board v. Greater Delaware Valley Savings and Loan Association* (C. A. 3 1960), 277 F. 2d 437, the court held, despite the existence of the same extensive board regulations, that a Federal association had the right to convert to a state association under state law without board approval and even during the pendency of charges of mismanagement by the board against the association. Since the board had not regulated that subject matter, the exercise of a state right could not be blocked.

These decisions are squarely in conflict with the decision below, since, as noted above, the District Court of Appeal has held that the presence and the exercise of broad powers of regulation by the board automatically bars the exercise of the rights of an association under general law without prior administrative proceedings before the board.[4]

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[4]In a case in which many of the claims made here are asserted, the Board has for the first time in thirty (30) years taken the position that it has jurisdiction to file suit by way of a cross-

IV.

The Question Presented Is of Substantial Importance in the Administration of the Home Owners Loan Act of 1933.

As the result of the adoption of the Act in 1933, millions of depositor-members have placed their funds in Federal savings and loan associations. California is recognized as one of the leading states in the savings and loan association field. The decision below imposes a serious impediment upon the right of depositors in those associations to protective relief against faithless fiduciaries where the present management declines to act.

The rule of law asserted below would be unconscionable if applied in practice. Under California law, the failure to exhaust administrative remedies is "jurisdictional", *Abelleira v. District Court of Appeal*, 17 Cal. 2d 280, 292, 109 P. 2d 942 (1941). Since the association and its members must have the right to prompt protection by the courts against fiduciaries who remove assets, embezzle funds, take property or jeopardize the existence of the association, the requirement for proceedings in Washington would be hopelessly frustrating to the prompt and vigorous protection of those rights.

Such a rule hopelessly and unreasonably gives greater protection to a guilty former director who has obtained illegal cooperation from present officers than it would

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claim agains faithless fiduciary directors and officers to recover and to impose a money judgment against them. Petitioners' Motion to Intervene in that action was denied and is now pending in the Court of Appeals for the Ninth Circuit. *Beverly Hills Federal Savings & Loan Association v. Federal Home Loan Bank Board* (C. S. D. C. S. D. 1962), ... Fed. Supp. ..... The case number is 18457.

to the same guilty director as to whom present management was adverse. In the latter case it is conceded that the association's direct suit would be permissible without restriction. Only if the association cooperated with the wrongdoer and refused to sue, thus requiring depositor-members to initiate a derivative action, do the wrongdoers obtain the benefit of delay and expense arising from a rule requiring an administrative proceeding in Washington.

The logic of the rule applied by the court below seems perverse. If an association may exercise directly the right to sue former directors for breach of fiduciary duty without any requirement for prior administrative action, how can it be argued that the exercise by the depositor-members of that association of the same right to sue, derivatively, permits the imposition of such an impediment? The fact is that to protect the rights of depositor-members of a Federal savings and loan association in cases where present management declines to act, the courts, unless clearly prohibited by Congressional statute, should adopt a policy of the "open door." The policy exemplified by the decision below is nothing less than an invitation to a dark tunnel with distant exits leading to a useless destination.

The petition for certiorari should be granted.

Respectfully submitted,

JACK CORINBLIT,
VAUGHAN, BRANBLIN, ROBINSON & ROEMER,
Attorneys for Petitioners.

APPENDIX A.

Home Owners' Loan Act of 1933, as Amended, 12 U.S.C., Section 1464(d)(1).

§1464. Federal Savings and Loan Association.

(a) *Organization authorized.*

In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as "Federal Savings and Loan Associations", and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and homefinancing institutions in the United States.

* * * * *

(d) *Proceedings to enforce compliance with law and regulations; grounds and procedure for appointment of conservators, etc.; powers.*

(1) The Board shall have power to enforce this section and rules and regulations made hereunder. In the enforcement of any provision of this section or rules and regulations made hereunder, or any other law or regulation, and in the administration of conservatorships and receiverships as provided in paragraph (2) of this subsection, the Board is authorized to act in its own name and through its own attorneys. The Board shall have power to sue and be sued, complain and defend in any court of competent jurisdiction in the United States or its territories or possessions or the Commonwealth of Puerto Rico. It shall by formal reso-

lution state any alleged violation of law or regulation and give written notice to the association concerned of the facts alleged to be such violation, except that the appointment of a Supervisory Representation in Charge, a conservator or a receiver shall be exclusively as provided in paragraph (*2*) of this subsection. Such association shall have thirty days within which to correct the alleged violation of law or regulation and to perform any legal duty. If the association concerned does not comply with the law or regulation within such period, then the Board shall give such association twenty days' written notice of the charges against it and of a time and place at which the Board will conduct a hearing as to such alleged violation of duty. Such hearing shall be in the Federal judicial district of the association unless it consents to another place and shall be conducted by a hearing examiner as is provided by the Administrative Procedure Act. The Board or any member thereof or its designated representative shall have power to administer oaths and affirmations and shall have power to issue subpenas and subpenas duces tecum, and shall issue such at the request of any interested party, and the Board or any interested party may apply to the United States district court of the district where such hearing is designated for the enforcement of such subpena or subpena duces tecum and such courts shall have power to order and require compliance therewith. A record shall be made of such hearing and any interested party shall be entitled to a copy of such record to be furnished by the Board at its reasonable cost. After such hearing and adjudication by the Board, appeals shall lie as is provided by the Administrative Procedure Act, and the review by

the court shall be upon the weight of the evidence. Upon the giving of notice of alleged violation of law or regulation as herein provided either the Board or the association affected may, within thirty days after the service of said notice, apply to the United States district court for the district where the association is located for a declaratory judgment and an injunction or other relief with respect to such controversy, and said court shall have jurisdiction to adjudicate the same as in other cases and to enforce its orders. The Board may apply to the United States district court of the district where the association affected has its home office for the enforcement of any order of the Board and such court shall have power to enforce any such order which has become final. The Board shall be subject to suit by any Federal savings and loan association with respect to any matter under this section or regulations made thereunder, or any other law or regulation, in the United States district court for the district where the home office of such association is located, and may be served by serving a copy of process on any of its agents and mailing a copy of such process by registered mail, or by certified mail, to the Federal Home Loan Bank Board, Washington, District of Columbia.

APPENDIX B.

Opinion of the District Court of Appeal.

In the District Court of Appeal of the State of California, Second Appellate District, Division One.

Bernard Reich and Sylvia Reich, depositors and members of Beverly Hills Federal Savings and Loan Association, individually and in behalf of Beverly Hills Federal Savings and Loan Association and the other depositor-members of said Association similarly situated, Plaintiffs and Appellants, vs. Eugene Webb, Jr., Marguerite R. Webb, Southland Mortgage Corporation, Lytton Financial Corporation, Lytton Savings and Loan Association, Bart Lytton, and Beverly Hills Federal Savings and Loan Association, Defendants and Respondents. Civil No. 26555.

Filed Aug. 5, 1963.

Appeal from a judgment of the Superior Court of Los Angeles County. Robert H. Patton, Judge. Affirmed.

Vaughan, Brandlin & Roemer, and Jack Corinblit, for Plaintiffs and Appellants.

Whyte & Schifferman, John Whyte, and Robert P. Schifferman, for Respondents Webb.

Thomas W. Clarke and Glen R. Miller for Respondent Beverly Hills Federal Savings and Loan Association.

The defendant Beverly Hills Federal Savings and Loan Association (hereinafter referred to as Beverly Hills Federal) and the defendants Mr. and Mrs. Webb, husband and wife (referred to as the Webbs), demurred to the first amended complaint. The demurrers were

sustained without leave to amend, and a judgment of dismissal was entered. Plaintiffs appeal from the judgment.

The first purported cause of action alleged in substance, as follows: Beverly Hills Federal was organized about 1936 as a federal savings and loan association under the name of Southland Federal Savings and Loan Association. About April 15, 1957, that name was changed to Beverly Hills Federal. Until early in 1961, defendant Mr. Webb was a director, the president, and the managing officer of Beverly Hills Federal; and defendant Mrs. Webb was also a director and officer thereof; and until said time they dominated and controlled the board of directors. The defendants Webb caused the defendant Southland Mortgage Corporation to be formed, and until early in 1961 substantially all its capital stock was owned by them, and they dominated and controlled the board of directors thereof.

The assets of Beverly Hills Federal are by law owned by the depositor-members in proportion to the amount of each member's deposits from time to time. Plaintiffs Reich are, and have been for several years, depositor-members of Beverly Hills Federal. They bring this action on behalf of Beverly Hills Federal and all of its depositor-members who may wish to join in this action.

A proper business opportunity of Beverly Hills Federal is and has been the related business of making appraisals of property and of servicing loans; and that all the fees, commissions, and profits which are incident to the business of such appraisals and servicing of loans were and are a business opportunity of Beverly Hills Federal and its members.

Plaintiffs allege upon information and belief that Southland Mortgage Corporation was formed by defendants Webb for the purpose of appropriating to that corporation and ultimately to themselves the said business opportunities of Beverly Hills Federal in that the Webbs by their control of Beverly Hills Federal prohibited it from participating in said corporate opportunities; and pursuant to the same scheme caused Southland Mortgage to acquire the business of making all the appraisals and inspections connected with the servicing of loans for Beverly Hills Federal, and as a result thereof Southland Mortgage received all the fees, commissions, and profits to which Beverly Hills Federal was entitled and would have received if it had been permitted to engage in said busines; opportunities.

During the past five years, defendants Southland Mortgage and the Webbs have received fees, commissions, and profits in an amount not yet determined by plaintiffs, but all of said fees, commissions, and profits are rightfully the property of Beverly Hills Federal and its members. All the business, assets, and profits of Southland Mortgage have been the property of Beverly Hills Federal and are held by said defendants Southland and the Webbs as constructive trustees for Beverly Hills Federal.

On August 15, 1961, plaintiffs made a demand upon the board of directors of Beverly Hills Federal to prosecute an action seeking the same relief as that which plaintiffs demand herein. The board failed and refused to take any action thereon. The refusal was because Lytton Financial Corporation is the owner of Southland Mortgage and Lytton Savings and Loan Association and also dominates and controls the board of directors of Beverly Hills Federal.

The second purported cause of action alleged in substance, as follows: Plaintiffs incorporate herein by reference the allegations of the first cause of action. At all times herein mentioned defendant Bart Lytton has been the president and a director of Lytton Financial Corporation (referred to as Lytton Financial) and has dominated and controlled Lytton Financial which is a holding company that holds the operating control of Lytton Savings and Loan Association. Early in 1961 the Webbs caused the assets and capital stock of Southland Mortgage to be sold and transferred to Lytton Financial, and a part of that transaction was the transfer of the control of Beverly Hills Federal and its board of directors from the Webbs to Lytton Financial. The sale and transfer of the control of Beverly Hills Federal took place contemporaneously with the sale of Southland Mortgage and was accomplished in part by the resignation of certain members of the board of directors formerly under the control of the Webbs and the substitution in their places of certain persons (Doe defendants) who are under the control of defendants Bart Lytton and Lytton Financial.

Plaintiffs allege upon information and belief that as a part of the said sale and transfer, the Webbs substituted Bart Lytton and other representatives of Lytton Financial as the proxy agents on proxies therefore given to the Webbs by the members of Beverly Hills Federal.

Lytton Financial paid $1,500,000 to the Webbs in consideration for said sale and transfer.

The right to membership on the board of directors of Beverly Hills Federal and the right to control said association were unlawfully sold by the Webbs, and the

proceeds of the sale are held in constructive trust for said association and its members by the Webbs.

The third purported cause of action alleged in substance, as follows: Plaintiffs incorporate herein by reference the allegations of the first and second causes of action. That after the sale of Southland Mortgage to Lytton Financial and the transfer of control of Beverly Hills Federal to Bart Lytton and Lytton Financial, and commencing about April 11, 1961, and continuing to date, the defendants Lytton and Lytton Financial in an unlawful exercise of control of Beverly Hills Federal caused Beverly Hills Federal to purchase from Lytton Savings certain notes and deeds of trust approximating $15,000,000 in face amount. Plaintiffs allege upon information and belief that by reason thereof the defendants Lytton and Lytton Financial have received profits, fees, and other monetary considerations from Beverly Hills Federal and its members in an amount not yet ascertained. Since early in 1961, Lytton, Lytton Financial, and Lytton Savings have dominated and controlled the board of directors and the business of Beverly Hills Federal. Plaintiffs are unable to protect the interest of Beverly Hills Federal and its members except by commencing this action.

Beverly Hills Federal demurred to the first amended complaint on the grounds (1) that it did not state facts sufficient to constitute a cause of action; (2) that the court did not have jurisdiction over the subject of the action in that the Federal Home Loan Bank Board has promulgated complete rules and regulations for the Federal Savings and Loan System which has exclusive jurisdiction of the control of Beverly Hills Federal, and the plaintiffs have failed to exhaust their

administrative remedies to petition the Home Loan Bank Board for relief as to the purported charges herein; and (3) that the court has no jurisdiction of the person of Beverly Hills Federal in that it has no jurisdiction to make a determination as to the propriety or legality of any conduct of said defendant in its internal management operations under the rules and regulations of the Home Loan Bank Board.

Defendants Mr. and Mrs. Webb demurred on the grounds (1) that the first amended complaint did not state facts sufficient to constitute a cause of action; (2) that the court had no jurisdiction of the subject matter of said causes of action in that the plaintiffs had failed to exhaust administrative remedies available to them; (3) that the portion thereof which seeks to impose a constructive trust on fees, commissions, or profits received by said defendants more than three years before commencing the action is barred by the statute of limitations.

In a minute order the court stated that the demurrers were sustained, without leave to amend, for the reason that exhaustion of the administrative remedies is a jurisdictional prerequisite to resort to the courts in any matter relating to the operation and regulation of any federal savings and loan association; and the authority, as well as the responsibility, for such regulation lies with the Home Loan Bank Board.

It appears from the amended complaint that the controversy pertains to internal affairs of management, organization, and control of Beverly Hills Federal Savings and Loan Association. Some of the allegations indicating such a controversy are to the following ef-

fect: The plaintiffs bring this action on behalf of themselves and Beverly Hills Federal and all of its depositors who may wish to join in this action. The defendants Webb, while they were directors and officers of Beverly Hills Federal and in control of its board of directors, formed Southland Mortgage for the purpose of appropriating to themselves, as principal owners of Southland, business opportunities which belonged to Beverly Hills Federal, namely, opportunities of making appraisals and inspections in connection with the servicing of loans. Said defendants did appropriate to themselves such opportunities and did receive therefrom fees, commissions, and profits which otherwise would have been received by Beverly Hills Federal. The Webbs, by reason of such conduct and their control of Beverly Hills Federal, prohibited Beverly Hills Federal from participating in those opportunities and from receiving such fees, commissions, and profits. In the sale of Southland Mortgage by the Webbs to Lytton Financial, the Webbs unlawfully included in the transaction (1) a transfer of the control of Beverly Hills Federal and the control of its board of directors, and (2) a substitution of B. Lytton and some of his representatives as the proxy agents on proxies which theretofore had been given to the Webbs by members of Beverly Hills Federal. After Lytton Financial obtained control of Beverly Hills Federal under said sale transaction, defendants Lytton Financial and B. Lytton in an unlawful control of Beverly Hills Federal caused it to purchase from Lytton Savings and Loan Association a large amount of notes and trust deeds, and as a result thereof Lytton Financial and B. Lytton have received fees and other monetary considerations.

Beverly Hills Federal is a federal savings and loan association. Such associations are authorized by an act of Congress. (Home Owners' Loan Act of 1933, 12 U.S.C.A., ch. 12, § 1464.) That act authorizes the Federal Home Loan Bank Board to issue charters for such associations. (Ibid.) The Home Loan Bank Board is an independent fiscal agency of the federal government (*Larwood Co. v. San Diego Fed. S. & L. Assn.*, 185 Cal. App. 2d 450, 452 [8 Cal. Rptr. 362]) and is authorized to prescribe rules and regulations for the "organization, incorporation, examination, operation and regulation" of federal savings and loan associations. Such rules and regulations are in the Code of Federal Regulations, title 12, chapter V, subchapter C, sections 541 to 555.11 inclusive.

As stated in *Larwood Co. v. San Diego Fed. S. & L. Assn., supra*, page 452, the "Board has provided extensively detailed rules for the government of each and every act of the internal affairs of associations and under the law fully adequate powers are granted to Board for the enforcement of its orders, including even the right to take over exclusive management of the association for failure or refusal to obey the Board's orders. (*Fahey v. Mallonee*, 332 U.S. 245 [67 S. Ct. 1552, 91 L. Ed. 2030].)" It was stated further therein at pages 452 and 453: "The rules of Board for control of the association provide a complete system of specific procedure by which any person aggrieved by actions relating to the internal affairs of an association may file a petition with Board to be heard and have his grievance acted upon, accompanied by compulsive orders to the association involved. . . ." Judicial notice is taken of the sales of the Board. (*Larwood Co. v. San Diego Fed. S. & L. Assn., supra*, p. 453.)

In *Woodward v. Broadway Fed. S. & L. Assn.*, 111 Cal. App. 2d 218 [244 P. 2d 467], wherein plaintiff sought a determination of the validity of an election of directors of a federal savings and loan association, it was held that plaintiff was required to exhaust his administrative remedy. It was said therein at pages 220 and 221: "Where an administrative remedy is provided by statute, relief must be sought from the administrative body, and this remedy must be exhausted before the courts will act. [Citation.] Exhaustion of administrative remedies is a jurisdictional prerequisite to resort to the courts. [Citation.] The doctrine of exhaustion of administrative remedies applies where a statute provides an administrative remedy, even though the terms of the statute do not make the exhaustion of the remedy of a condition of the right to resort to the courts. [Citation.] The doctrine, whenever applicable, requires not merely the initiation of prescribed administrative procedures; it requires pursuing them to their appropriate conclusion and awaiting their final outcome before seeking judicial intervention. [Citation.] '[I]t lies within the power of the administrative agency to determine in the first instance, and before judicial relief may be obtained, whether a given controversy falls within the statutory grant of jurisdiction. [Citation.].'" It was also said in that case (p. 223): The rules and regulations of the Board "are comprehensive, explicit, and govern the operation of federal saings and loan associations from their inception to their dissolution. They have the force and effect of law and are binding on an association, its board of directors, and its members."

As above indicated, the amended complaint does not pertain to the individual rights or claims of plaintiffs with respect to their deposits; but it pertains to their rights, and the rights of Beverly Hills Federal itself and all of its depositor-members with respect to the manner of servicing loans, the right to receive compensation therefor, the election of directors, and the transfer of proxies to persons other than those designated on the proxies. Those matters relate to the management of the internal affairs of Beverly Hills Federal. Since the rules and regulations of the Home Loan Bank Board contain detailed provisions regarding the government of such internal affairs, the plaintiffs are thereby afforded administrative remedies. It does not appear from the amended complaint that plaintiffs have exhausted such remedies. There is nothing in the record to indicate that they could have amended to include such an allegation.

The court did not err in sustaining the demurrers without leave to amend.

The judgment is affirmed.

Wood, *P. J.*

We concur:

Fourt, *J.*

Lillie, *J.*

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IN THE

Supreme Court of the United States

October Term, 1963

No. 862

BERNARD REICH and SYLVIA REICH, depositors and members of BEVERLY HILLS FEDERAL SAVINGS AND LOAN ASSOCIATION, individually and in behalf of BEVERLY HILLS FEDERAL SAVINGS AND LOAN ASSOCIATION and the other depositor-members of said association, similarly situated,

Petitioners,

vs.

EUGENE WEBB, JR., MARGUERITE R. WEBB and BEVERLY HILLS FEDERAL SAVINGS AND LOAN ASSOCIATION,

Respondents.

On Petition for a Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District.

Brief of Respondent, Beverly Hills Federal Savings and Loan Association, in Opposition.

Respondent Beverly Hills Federal Savings and Loan Association opposes the granting of a writ of certiorari. The Petition does not show any basis for the invocation of this Honorable Court's certiorari jurisdic-

tion. The decision of the court below is simply an application by the highest court of the State of California of its own doctrine of exhaustion of administrative remedies limiting the exercise of jurisdiction by California courts, and does not present any question reviewable by this Court.

Jurisdiction.

Jurisdiction of this matter is claimed under 28 U. S. C. § 1257(3) on the ground that the decision below creates an immunity for the benefit of Respondents under the provisions of the Home Owners' Loan Act of 1933.[1] Jurisdiction on this basis is denied by Respondents. As hereinafter pointed out, no "title, right, privilege or immunity is specially set up or claimed" or has been set up or claimed in this case under said Act.

The Question Presented.

The statement of the questions presented in the Petition assumes that certiorari jurisdiction is established and that this Honorable Court should determine whether claims of breach of fiduciary duty are the subject of "an appropriate administrative remedy" pursuant to the provisions of 15 U. S. C. § 1464(d)(2).

To the contrary, the real question presented by this Petition is whether the opinion of the court below is a final judgment of the highest court of a state in a matter "where any title, right, privilege or immunity is specially set up or claimed under the constitution, treaties or statutes . . . . the United States."

---

[1] 12 U. S. C. A. §§ 1461-1468

Statement.

As pointed out in the statement of Petitioners (Pet. 7-11), this is simply an action to enforce alleged common law fiduciary obligations of directors and former directors of Respondent Beverly Hills Federal Savings and Loan Association, a claim in no way depending on federal law. It is in form a derivative suit in view of the refusal of the existing management to act. The highest court of the State of California has held that such derivative suit asserting such common law rights of the Association is subject to the jurisdictional requirement that before action may be brought such claims be first submitted to the Federal Home Loan Bank Board. In so holding, the court has applied a general requirement of exhaustion of administrative remedies which is a jurisdictional prerequisite to resort to the California courts in all cases between all litigants. As pointed out in the Petition, the court discussed the administrative procedures provided by the Home Owners' Loan Act of 1933. Its discussion of these procedures, however, is simply a statement of a fact upon which the application of the California doctrine of exhaustion of administrative remedies depends.

ARGUMENT.

Fundamental to any consideration of this Court's certiorari jurisdiction is a proper understanding of the decision of the District Court of Appeal of the State of California. The basis of said court's decision that the California courts have no jurisdiction over the assertion of common law claims of fiduciary duty by derivative action in this case is stated in that portion of its opinion commencing at page 12 of Appendix B to the Petition. It is there pointed out, citing California authority announcing a rule of California procedure, that it is a jurisdictional prerequisite to resort to the courts in any case wherein administrative procedures are provided that such remedy be first exhausted. In this connection it is made clear that it is of no significance whether the statute providing the remedy makes exhaustion of such remedy a condition precedent to resort to the courts and further, that if the question of the availability of administrative remedy is involved and an administrative agency exists "it lies within the power of the administrative agency to determine in the first instance, and before judicial relief may be obtained, whether a given controversy falls within the statutory grant of jurisdiction." It is thus apparent that all that has been held by the District Court of Appeal is that the Home Owners' Loan Act of 1933 establishes an administrative procedure and an administrative agency to which Petitioner was at least required to submit its controversy so that such agency could determine whether it would exercise administrative jurisdiction over it. It is also abundantly clear that the court did not deny jurisdiction of the California courts on the ground that it was under compulsion of the Home Owners' Loan

Act of 1933 or any other federal law to do so. Under such circumstances the decision is merely a determination by the State courts of a matter of local procedure which is not subject to review by this Honorable Court.

The provision of 28 U. S. C. § 1257(3) conferring certiorari jurisdiction where a title, right, privilege or immunity is set up under a federal statute, is not intended to establish such jurisdiction over every case in which there is a discussion of the construction of a federal statute. As this Court has often made abundantly clear, certiorari jurisdiction is for the purpose of reviewing judgments, not statements in opinions. *Black v. Cutter Laboratories*, 351 U. S. 292. The reference to the Home Owners' Loan Act of 1933, in the opinion of the District Court of Appeal of the State of California, is at most the assignment of a reason why in its view the California rule requiring exhaustion of administrative remedies is applicable. More accurately it is simply the statement of its view as to what the facts are upon which such local rule applies. It is manifest in any event that it does not constitute a determination that any immunity or privilege exists under such statute.

1. The Determination That the State Court Has No Jurisdiction of the Case Is Not Subject to Review.

Whatever the reasons for its decision, it is clear that a decision of the highest State court denying jurisdiction is, unless such denial is on a discriminatory basis violating constitutional principles, solely the concern of such State court, and does not raise any federal question.

It was originally so held in *Smith v. Adsit*, 83 U. S. 185. Relief against a sale of land on the ground that it violated an act of Congress was denied in a State court for lack of jurisdiction. The writ of certiorari was dismissed by the Supreme Court, in an opinion which flatly states that regardless of the reasons assigned the State court's holding which denies jurisdiction is not reviewable on certiorari. The court said:

> ". . . But whatever may have been the reasons for the decision, whether the court had jurisdiction of the case or not, is a question exclusively for the judgment of the State court." (p. 190.)

There are only two exceptions which have ever been recognized to this rule. The first is that in denying jurisdiction the State courts may not discriminate between claimants, at least where such claimants are asserting rights under federal statutes. Examples of decisions of this Honorable Court imposing the latter limitation are *Baltimore & Ohio R. Co. v. Kepner*, 314 U. S. 44, and *Miles v. Illinois Central R. Co.*, 315 U. S. 698. There is, however, in the case at bar no claim that there has been any discrimination by the courts of California in the denial of jurisdiction nor, in fact, is there any claim that the Petitioner herein is asserting any rights under a federal statute. Rather, it is denied by Petitioner that the federal statute has any application.

The only other exception to the rule above stated is that where a State court has denied its jurisdiction because it has felt under compulsion of federal law to do so, certiorari may be granted to relieve the court of such compulsion. This question was fully and authoritatively discussed by this Honorable Court in *Southern*

R. Co. v. Mayfield, 340 U. S. 1. In that case, the opinion of the State court did not make it clear whether it was denying jurisdiction of its courts to dismiss under the doctrine of *forum non conveniens* in a case under the Federal Employers' Liability Act upon the basis of "its own notions of procedural policy" or "because it felt under compulsion of federal law as enunciated by this court so to hold." For that reason the case was remanded to the State Supreme Court to act consistently with the view of the Court on the latter assumption. It is made abundantly clear, however, that if the basis for the court's decision was simply its own notions of procedural policy, no certiorari jurisdiction could be invoked. In this respect this Court said:

> ". . . If denial of a motion to dismiss an action under the Federal Employers' Liability Act is rested on such a general local practice, no federal issue comes into play. . . . ." (p. 3.)

As above pointed out, the decision of the District Court of Appeal of California makes it clear beyond question that it is simply the general local practice which is therein applied and that the court has not acted "under compulsion of federal law." This is removed from any legitimate dispute by the court's clear statement that it is the *availability* of an administrative agency to which the question of proceeding administratively can be submitted that sets in motion the requirement applied and that such requirement applies regardless of the fact that the statute creating the administrative body and the administrative procedure does not purport to make "the exhaustion of the remedy a condition of the right to resort to the courts." (Pet. App. B, p. 12.)

2. No "Immunity" Under Federal Law Is Involved in Any Event.

Wholly apart from the sufficient reason stated under heading 1 hereof, precluding exercise of certiorari jurisdiction, it is apparent that there is no foundation to the claim that the application of the doctrine of exhaustion of administrative remedies operates to create an immunity within the meaning of 28 U. S. C. § 1257(3). The operation of the doctrine of exhaustion of administrative remedies does not provide any immunity to any party with respect to the assertion of any claims against them. It simply imposes a procedural requirement against proceeding in a particular fashion. No substantive rights of the Petitioners can in any respect be effected by their being first required to at least submit the matter to the Federal Home Loan Bank Board so that it can determine the extent to which it will exercise its administrative jurisdiction. It is thus clear that the entire question presented relates solely to a matter of local procedure and not to a matter of immunity as a matter of substantive right. Determinations of matters pertaining to local procedure are not a proper subject of certiorari jurisdiction unless they involve constitutional guarantees. *Iowa Central Railway Company v. Iowa*, 160 U. S. 389.

Conclusion.

There is no basis for invocation of this Honorable Court's certiorari jurisdiction and therefore the Petition should be denied.

Respectfully submitted.

THOMAS W. CLARKE,
Attorney for Respondent, Beverly Hills Federal Savings and Loan Association.

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IN THE

Supreme Court of the United States

October Term, 1963
No. 862

BERNARD REICH and SYLVIA REICH, depositors and members of BEVERLY HILLS FEDERAL SAVINGS AND LOAN ASSOCIATION, individually and in behalf of BEVERLY HILLS FEDERAL SAVINGS AND LOAN ASSOCIATION and the other depositor-members of said association, similarly situated,

Petitioners,

vs.

EUGENE WEBB, JR., MARGUERITE R. WEBB and BEVERLY HILLS FEDERAL SAVINGS AND LOAN ASSOCIATION,

Respondents.

On Petition for a Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District.

Brief of Respondents Eugene Webb, Jr. and Marguerite R. Webb, in Opposition to Petition for Writ of Certiorari.

Preliminary Statement.

These respondents believe that two considerations should influence this Honorable Court's decision whether or not to grant certiorari in the instant case, to wit: (1) does jurisdiction to grant certiorari exist upon the ground claimed by petitioners; and (2) even if such jurisdiction exists, are factors present which

militate against the desirability of exercising jurisdiction at this time?

In order to invoke this Court's jurisdiction under 28 U. S. C. §1257(3), as petitioners have done, it must be shown that a "title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States." Respondent Beverly Hills Federal Savings and Loan Association in its brief filed in opposition to the petition for certiorari has demonstrated that jurisdiction does not exist as claimed by petitioners. To the statements therein made, these respondents would add the following observations on the question of jurisdiction.

Petitioners claim (Petn. pp. 3-5) that the California courts so construed the Home Owners' Loan Act of 1933 as to create an immunity from suit. Respondents at no time so contended, and the California courts made no such determination. What the trial court stated, and what the appellate courts affirmed, is that *as a matter of California law* petitioners were required to exhaust their administrative remedy before turning to the courts for relief. The judgment was, therefore, based upon an independent and adequate nonfederal ground, and under familiar principles this Court will not interfere with such a determination of state law.

These respondents do not, however, rest their opposition merely upon a want of the jurisdiction invoked by petitioners. As we shall now demonstrate, even if probable jurisdiction were to exist, there are compelling reasons which contra-indicate its exercise upon the present posture of the case.

ARGUMENT.

I.

The Matters Complained of Are Within the Province of the Federal Home Loan Bank Board, and Petitioners Have an Administrative Remedy Before That Agency Which Must First Be Exhausted.

A. Nature of the Problem Presented.

Petitioners seek to have the California courts interfere with the internal management and control of a federal savings and loan association. Their first amended complaint alleged that there had been a wrongful transfer of "control" of the Association, assertedly accomplished in part by the resignation of the Webbs as directors of the Association and partly by transfer of proxies [C. T. pp. 25-26]. The instant petition, however, focuses attention only upon the charge of wrongful transfer of proxies (see, *e.g.*, Petn. pp. 2, 6, 8). As we shall see, apart from the question of transfer of proxies, the Board has adopted regulations pertaining to the resignation of directors as well as their powers, and the necessity for administrative interpretation of those regulations is apparent.

Throughout their brief, petitioners emphasize the claimed breach of fiduciary duties and contend that the Board's regulations do not cover breach of fiduciary duties (see, *e.g.*, Petn. pp. 2, 4, 6, 13). The purported breach of fiduciary duties, however, had its genesis in *acts*, and the regulations adopted by the Board definitely impinge upon the acts assertedly committed by respondents. This requires a determination by the Board as to whether or not there has been a breach of fiduciary duties, as petitioners contend.

B. Petitioners' Pleading Tenders Issues Requiring Prior Resort to Their Administrative Remedy.

Petitioners' second cause of action is stated by them to be the critical cause of action in the complaint (Petn. p. 12). That cause of action [C. T. pp. 25-27] alleges that the Webbs transferred "control" of the Association to Lytton Financial, which said transfer was accomplished partly by the resignation of the Webbs and others as directors of the Association and partly by transfer of proxies. Petitioners as depositor-members of the Association seek to assert derivatively the claimed right of the Association to recover moneys paid to the Webbs, allegedly for such transfer of control.

California appellate courts have consistently ruled that if a controversy involves matters (a) affecting the internal management, operation or *control* of a federal savings and loan association, or (b) requiring interpretation of applicable rules and regulations prescribed by the Board, the courts have no power to act until the complainant has exhausted his rights under the Board's administrative process, whereas if the controversy involves a private dispute between such an association and one of its members or a person dealing with the association, such a dispute may be taken directly to the courts without interposition of administrative process. *Woodard v. Broadway Federal S. & L. Assn.* (1952) 111 Cal. App. 2d 218, 224-225, 244 P. 2d 467; *Larwood Co. v. San Diego Federal S. & L. Assn.* (1960) 185 Cal. App. 2d 450, 454-456, 8 Cal. Rptr. 362; *People v. Metrim Corp.* (1960) 187 Cal. App. 2d 289, 292-293, 9 Cal. Rptr. 584. Furthermore, under California law it lies within the power of the Board to determine in the first instance whether a con-

troversy with respect to the internal management of an association *is* within its sphere of jurisdiction, and the trial court has no jurisdiction to act until that determination has first been made by the Board. *Woodward v. Broadway Federal S. & L. Assn., supra,* at 224-225; *Larwood Co. v. San Diego Federal S. & L. Assn., supra,* at 453. This latter principle of conferring the initial determination as to jurisdiction to act upon the administrative body has heretofore been applied by this Court. *San Diego Bldg. Trades Council v. Garmon* (1959) 359 U. S. 236, 244-245. The principle has been applied also at the Court of Appeals level. See *D. G. Bland Lumber Co. v. N. L. R. B.* (5th Cir. 1959) 177 F. 2d 555, 557.

The distinction between cases pertaining to corporate internal affairs, as distinguished from private disputes, has been defined as follows:

> "Where the act complained of affects the complainant solely in his capacity as a member of the corporation, whether it be as stockholder, director, president, or other officer, and is the act of the corporation, whether acting in stockholders' meeting, or through its agents, the board of directors, then such action is the management of the internal affairs of the corporation. . . . Where, however, the act of the foreign corporation complained of affects the complainant's individual rights only, then our courts will take jurisdiction, whenever the cause of action arises here."
>
> *North State Copper & Gold Mining Co. v. Field* (1885) 64 Md. 151, 20 Atl. 1039, 1940.

Applying the foregoing definition to the allegations of petitioners' pleading, who can fault the District

Court of Appeal in deciding (Appendix B to Petn., pp. 9-10) that the controversy pertains to internal affairs of management, organization and control of the Association? This follows because petitioners are contending that the monies paid to the Webbs should be turned over to the Association [C. T. p. 28], which said monies would in turn be distributable to petitioners *as members of the Association* upon a liquidation, dissolution, or winding up of said corporation. 12 Code of Federal Regulations, Sec. 544.1(b)10. Furthermore, the acts complained of are the acts of the corporation because these respondents, *acting as directors of the Association*, assertedly transferred control of the Association to Lytton.

Under the circumstances, the *Woodard* and *Larwood* cases require exhaustion of administrative remedies before resort may be had to the courts.

C. The Board Has Adopted Regulations Which Impinge Upon the Issues Cast by the Complaint, and Those Regulations Should Be Interpreted by the Board.

These respondents showed in their brief filed with the District Court of Appeal (Br. pp. 8-14) that the Board has adopted regulations bearing upon each of the purported causes of action in the first amended complaint. Respondents will not burden the record with a restatement of those regulations, except to point out that the matters of resignation of directors and exercise of powers by the Association's board of directors (which underlie the second cause of action and serve as the predicate for the claimed breach of fiduciary duty) are embraced within the form of by-laws prescribed for this Association and provided for in Part 544, Sec. 544.5, subdivs. 6 and 7, of the Board's rules

and regulations. 12 Code of Fed. Regs., Sec. 544.5. If there is any uncertainty as to the effect of those by-law provisions upon the conduct complained of in the second cause of action, the Board, which promulgated those by-laws, should be given the first opportunity to construe their impact upon the situation, thereby promoting uniformity and consistency in the regulation of federal savings and loan associations.

Whether the problem in a given case be one of primary jurisdiction in an administrative agency or exhaustion of administrative remedies,* the guiding principle should be that heretofore enunciated by this Court:

> ". . . in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. *Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by spe-*

*Professor Davis opines that *Woodward v. Broadway Federal S. & L. Assn.* relied on by the California District Court of Appeal in this case involves primary jurisdiction, rather than exhaustion of administrative remedies. 3 Davis, Administrative Law Treatise (1958) sec. 19.08, p. 51. It is fundamental that the primary jurisdiction doctrine applies even if the administrative agency has no jurisdiction to grant the relief sought. *Idem*, sec. 19.07, p. 39.

cialization, by insight gained through experience, and by more flexible procedure." (Emphasis supplied).

Far East Conference v. United States (1951) 342 U. S. 570, 574-575.

See also:

United States v. Western Pacific Railroad Co. (1956) 352 U. S. 59, 64-66.

When that principle is applied to the case at bar, the conclusion is inescapable that petitioners should be required to exhaust their administrative remedy before the Board before turning to the courts for relief, in order to utilize the Board's expertise in matters affecting federal savings and loan associations.

D. Petitioners Have an Administrative Remedy Before the Board.

Section 542.2 of Part 542 of the Board's rules and regulations provides for the granting of a hearing at the request of any person who has made an application or petition to the Board pursuant to any provision of parts 543, 544, 545 or 546 of the subchapter. Petitioners in a footnote to their petition (footnote 2, p. 18) attempt to brush off this administrative remedy upon the basis that "Those subchapters are each admittedly irrelevant to any of the claims in this action." To the contrary, as shown by these respondents in their brief before the District Court of Appeal (Br. pp. 8-14), the regulations found in subchapters 544 and 545 have a very material bearing upon the issues of this case.* Petitioners' similarly cavalier treatment

*First Cause of Action of amended complaint: Section 545.6-10 of Part 545 of the Board's ruling and regulations; Second Cause

in that footnote of the further provision in Section 542.2 of the regulations that "The Board may order a hearing in connection with the consideration of any matters arising under any provision of the rules and regulations of this sub-chapter, whether or not any request therefor has been made by any person." does not detract from the effect of that provision in conferring an administrative remedy.

Petitioners' pique seems to lie in the fact that once having initiated the administrative proceeding, they may be supplanted by the Board in representation of the Association (Petn. p. 15). Indeed, the entire tenor of the petition is that they as depositors in the Association should be permitted to enforce asserted rights of the Association in derogation of the authority of the Board. These respondents in their brief before the District Court of Appeal (Br. pp. 10-17) questioned the soundness of equating petitioners with stockholders in a profit-making corporation so as to have the standing to assert derivatively a purported cause of action inhering in the Association. Our position in this regard is echoed in the *Daurelle* case cited by petitioners (Petn. p. 27). See *Daurelle v. Traders Federal S. & L. Assn.* (1958) 143 W. Va. 674, 104 S. E. 2d 320, 332-333.

E. The Instant Decision Does Not Conflict With Decisions of This Court.

The decisions of this Court cited at pages 19-20 of the petition in no way conflict with the decision of the District Court of Appeal. In the *Greene* case

of Action: Section 544.5, Subdivs. 6 and 7 of Part 544; Third Cause of Action: Section 545.6-5 of Part 545.

(Petn. p. 19) this Court declined to apply retroactively a regulation adopted in 1960 so as to require exhaustion of an administrative remedy not required under a 1955 directive. The factual setting there is in no way analogous to the case at bar. In *Skinner and Eddy* (Petn. p. 19) the problem was one of an agency's exceeding its statutory powers; no such question obtains here. The *Alkali Export Association* case (Petn. pp. 19-20) treated of functions of the Federal Trade Commission under §5 of the Webb-Pomerene Act. According to this Court, that Commission's recommendation "need not be followed by any court or administrative or executive officer." (325 U. S. 196, 210); whereas the regulations of the Federal Home Loan Bank Board have the force and effect of law and are binding on an association, its board of directors, its officers and its members (see authorities cited at page 5 of these respondents' brief before the District Court of Appeal). Furthermore, the Board is by statute empowered to act in its own name and through its attorneys in enforcement of the Home Owners Loan Act and regulations made thereunder. 12 U. S. C. A. §1464(d)(1).

In *Township of Hillsborough* (Petn. p. 20), uncertainty existed concerning the meaning of a local law, and the remedy, if any, was speculative. As previously shown, here there is a clear-cut right on the part of the Reichs to petition for an administrative hearing. Should the Board determine after a hearing that pe-

titioners' claims have merit, there is ample provision made by law for prosecution of the Association's rights, either by the Board in its own name or by a conservator or receiver appointed by the Board for that purpose. 12 U. S. C. A. §1464(d)(1) and (2).

Petitioners find in this Court's decisions in the *Agnes K. Head* and *Colorado Anti-Discrimination Committee* cases (Petn. pp. 22-25) a claimed inconsistency with the decision in this case. A mere reading of those decisions demonstrates their inapplicability to the instant case.

In both the *Head* and *Colorado* cases the problem presented was one of claimed federal preemption of the field. In each case this Court found no evidence of a Congressional design to preempt the field; the legislation was upheld as a proper exercise of the state's police power. One of the most significant distinctions between those cases and the case at bar is pointed up by the quotation given by petitioners (Petn. p. 24) from the *Head* case wherein this Court was shown to be speaking of "areas of the law not inherently requiring national uniformity." In the instant case, national uniformity in the interpretation and application of the Board's regulations affecting federal savings and loan associations is of paramount importance and calls for initial reference of such matters to the Board for the reasons stated by this Court in the *Far East Conference* case.

II.

Since the Ruling Complained of, Matters Have Occurred Which Render the Pending Petition Moot, as Shown by the Record Before This Court.

Petitioners state (Petn. p. 14), "In 30 years of enforcement of the act the board *had* never sued a director for breach of fiduciary duty and *had* never commenced an administrative proceeding against a director for breach of fiduciary duty." (Emphasis supplied). A further intimation of the supervening facts is given by petitioners (Petn. p. 27, footnote 4) when they show that the Board has asserted jurisdiction with respect to petitioners' claims by the filing of a cross-claim against these respondents and others in pending litigation in the United States District Court for the Southern District of California. Petitioners in their opening brief before the California District Court of Appeal in this action (Op. Br. p. 35, note 1; Appendix B to Op. Br. pp. 4-5) adverted to the following matters occurring since the ruling of which they complain and thereby invited consideration by the state appellate court, and by this Court, of such facts:

After the ruling complained of, the Board initiated proceedings against the respondents herein with respect to the charges made by petitioners. Respondent Beverly Hills Federal Savings and Loan Association thereafter filed an action for declaratory relief against the Board in the United States District Court for the Southern District of California. The Board filed a counterclaim and cross-claim therein in which it sought substantially the relief which petitioners here seek. Petitioners filed a motion to intervene in that action.

which was denied upon the grounds that the District Court had jurisdiction to give judgment on the counterclaim of the Board and that the Board adequately represented petitioners' interest. Petitioners have appealed to the United States Court of Appeals for the Ninth Circuit from denial of their motion for leave to intervene; that appeal has been briefed, argued, and stands submitted for decision.

Thus, not only has the administrative agency acted upon petitioners' grievances; it has taken affirmative action along the lines which petitioners seek to pursue. Under these circumstances, unless petitioners are to be permitted to supersede the administrative agency having regulatory power over federal savings and loan associations, they must give way to the assertion of a superior representative right.

Noteworthy also is the fact that *petitioners* by their own admission (see Appendix B, page 6 to their Opening Brief in the California District Court of Appeal) *have filed a separate and independent action* in the United States District Court for the Southern District of California *against respondents asserting essentially the same claims made in the complaint in this case*, which said action is now pending. These respondents submit that by thus engaging in judicial leapfrog, petitioners demonstrate a marked disrespect for the orderly processes of the law and are openly flaunting the authority of both state and federal courts. Such conduct should not be condoned.

Conclusion.

It clearly appears from the record before this Court that the Board as *parens patriae* is protecting the interests of petitioners and all other members of the Association, and therefore judicial intervention by the Superior Court of the State of California for the County of Los Angeles is not only unnecessary but would tend to interfere with the jurisdiction over the controversy which has been assumed by the federal courts. Under such circumstances a paraphrase of this Court's statement in the *Far East Conference* case appears most appropriate: "Business-like procedure counsels that the [petitioners'] complaint should now be dismissed . . ." (342 U. S. 570, 577).

The petition for writ of certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondents Webb.

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IN THE

Supreme Court of the United States

October Term, 1963

No. 862

BERNARD REICH and SYLVIA REICH, depositors and members of BEVERLY HILLS FEDERAL SAVINGS AND LOAN ASSOCIATION, individually and in behalf of BEVERLY HILLS FEDERAL SAVINGS AND LOAN ASSOCIATION and the other depositor-members of said association, similarly situated,

Petitioners,

vs.

EUGENE WEBB, JR., MARGUERITE R. WEBB and BEVERLY HILLS FEDERAL SAVINGS AND LOAN ASSOCIATION,

Respondents.

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

October Term, 1963

No. .....

BERNARD REICH and SYLVIA REICH, depositors and members of BEVERLY HILLS FEDERAL SAVINGS AND LOAN ASSOCIATION, individually and in behalf of BEVERLY HILLS FEDERAL SAVINGS AND LOAN ASSOCIATION and the other depositor-members of said association, similarly situated,

Petitioners,

vs.

EUGENE WEBB, JR., MARGUERITE R. WEBB and BEVERLY HILLS FEDERAL SAVINGS AND LOAN ASSOCIATION,

Respondents.

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Respondents' Contention That the Decision Below Rests on an Adequate and Independent State Ground and Is Not Within 28 USC 1257(3) Is Without Merit.

The two integral parts of the decision below are (a) that as a matter of federal law there is an available administrative remedy before the Federal Home Loan Bank Board with respect to petitioner's claim, and (b) that under state or federal law, petitioners are obligated to exhaust this remedy prior to judicial action. With respect to these two aspects of the decision, it is cer-

tainly apparent as a matter of common sense and logic that the critical decision is the *existence under federal law of a remedy* since without that determination the general principle of exhaustion *decides no issue.* That this federal question was the critical decision below is shown by the language of the opinion and by the language of the earlier decisions upon which the opinion relies. Thus the court below said,

> "Since the rules and regulations of the Home Loan Bank Board contain detailed provisions regarding the government of such internal affairs the plaintiffs are thereby afforded administrative remedies. It does not appear from the amended complaint that plaintiffs have exhausted such remedies. There is nothing in the record to indicate that they could have amended to include such an allegation. The court did not err in sustaining the demurrers without leave to amend." (Pet. (Appx. B. p. 13.)

In *Larwood Co. v. San Diego Federal Savings & Loan Association*, 185 Cal. App. 2d 450, 8 Cal. Rptr. 362, the court expressly labeled the *federal* question as the critical question. Thus, the court said in deciding that there was no duty to exhaust:

> "From the foregoing, it will be seen that the decision of the present cause *must* lie in whether or not, by any fair construction of the laws of Congress and the rules of board, it is intended that board determine private controversies between borrowers and the association." (Emphasis supplied).

In *Woodward v. Broadway Federal Savings and Loan Assn.*, 111 Cal. App. 2d 218, 244 P. 2d 467, the

principal decision relied upon by the court below, the court, after discussing in detail the provisions of the act and the regulations, stated as respects that action:

> "Since an administrative remedy is provided, the plaintiffs must first exhaust that remedy before turning to the courts for relief."

As this court stated in *Ivanhoe Irrigation District v. McCracken* (1958), 357 U. S. 275, 2 L. Ed. 1313, 70 S. Ct. 774, when it rejected appeal but granted certiorari to review a decision of the California courts wherein federal and state issue questions were similarly interwoven:

> "Basically, it is the interpretation of the federal act that opens the door to the application of the state law . . . (citations)."

This court's decision in *Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U. S. 164, is also relevant wherein it was held that:

> "Where the non-federal ground is so interwoven with the other as not to be an independent matter . . . our jurisdiction is plain."

Similarly here, it is the interpretation of the federal statute, *i.e.*, the Federal Home Loan Act of 1933, and the regulations of the Board, as to the existence or non-existence of a federal administrative remedy applicable and available as respects petitioners' claim which opens or closes the door to the application of the "exhaustion" rule of law.

Of course, it follows logically that, insofar as the decision below included reference to a *general rule* requiring exhaustion of administrative remedies, the decision of that question standing alone was neither "*adequate*"

nor "independent," within the meaning of this court's certiorari decisions, to support the judgment. The federal question was critical.

Enterprise Irrigation District v. Farmers Mutual Canal Co., 243 U. S. 157, 164;
Murdock v. Memphis, 20 Wall. 590, 630;
Eustic v. Bolles, 150 U. S. 361, 370.

Respondents, who assert that there is *no* federal question raised below, also assert that there is no jurisdiction in this Court. It is difficult to understand the contention that when respondents claimed the *right* or *privilege* under *federal law* of requiring exhaustion of an allegedly available *federal remedy* or when respondents asserted that petitioner's action should be dismissed and that respondents were *immune from judgment in this action* by the California court, subject to a proceeding under a *federal statute*, that this does not constitute a federal question within the meaning of 28 U.S.C. 1257(3).

It should be recalled that petitioner's action below was dismissed as a result of respondent's defense. Such dismissal, the California court decided, was required, "since the rules and regulations of the Home Loan Bank Board contained detailed provisions regarding the government of such internal affairs" and the plaintiffs are therefore afforded administrative remedies. (App. B, p. 3). This dismissal certainly results in an "immunity" for respondents in this action but more important, *this immunity may well be permanent.* There is a stat-

ute of limitations in California with respect to the recovery for breach of fiduciary duty which may be either three years or four years (Calif. Code Civ. Proc., §§343, 338(4)). There can be no contention that the act or the regulations permit the Board to recover moneys from former directors for breach of fiduciary duty. Thus, if the Board has no standing to sue former directors for money relief—and for thirty years this has been the uniform interpretation of the statute—then during the course of petitioners' required but hopeless application to the Board for administrative relief and the potential *de novo* hearings and appeals, the Statute of Limitations may well run.[1]

In this case the sum of $1,500,000 was taken by the respondents Webb in 1961. It is not too drastic a statement to make that unless certiorari is granted in this case and the action reinstated that the members of the association are exposed to an overwhelming risk that the rights of the members of this federal association to recover for the breaches of fiduciary duty alleged will never be adjudicated and the relief for the association based upon these rights will never be obtained.

With respect to jurisdiction of this court under 28 U.S.C. 1257(3), it has long been established that assertion under federal law that the jurisdiction of a fed-

[1]It should be noted again that the act provides unusual provisions for *de novo* proceedings in federal court at the instance of either the board or the association as a substitute for a hearing commenced by the board. There is also review by the court of appeals under the Administrative Procedure Act (12 U. S. C. A. §1464(d)(1)).

eral agency or court *delays, diverts* or *precludes* a state court action is the assertion of a "right, privilege or immunity" under a federal statute so as to give this court jurisdiction.[2]

Williams v. First National Bank, 216 U. S. 582, 54 L. Ed. 625, and cases cited beginning at p. 626;

Texas and Pacific Railway v. Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553;

Loomis v. Lehigh Valley Railway Co., 240 U. S. 43, 60 L. Ed. 517;

Great Northern Railway Co. v. Merchants Elevator Co., 259 U. S. 285, 66 L. Ed. 943.

Thus, it is clear that a critical and highly important determination of a federal question upon federal grounds was rendered by the court below to which this court's jurisdiction clearly applies.[3]

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[2]Since the California court here held *it had no* jurisdiction, respondents Webb assert, upon the authority of Professor Davis, that such determinations are really "primary jurisdiction" decisions. (See Brief of Respondents Webb, page 7.) It should be noted that as respects the jurisdiction of this court, the assertion of a right, privilege or immunity is no less a *federal* question whether the judgment below rests upon "primary jurisdiction" of a federal agency or court or "exhaustion of administrative remedies" of a federal agency.

[3]Respondent Beverly Hills Federal asserts that unless "compulsion" of federal law or discrimination is shown, jurisdiction is not established. Assuming the correctness of this rule, it was the alleged compulsion of federal law as to the existence of an administrative remedy which resulted in the dismissal below. Moreover, no showing has been made that shareholders in other California corporations must complete an irrelevant exhaustion of remedies prior to judicial action.

II.

The Two Provisions of the Board's Rules Which Respondents Assert Provide an Administrative Remedy in This Action Are Irrelevant to Respondents' Contentions and in Fact Disprove Their Argument.

Respondents Webb, at pages 8 and 9 of their Brief, cite only the following two provisions of the board's rules and regulations as being relevant to the question of the availability of an administrative remedy insofar as petitioners' second cause of action is concerned.

(a) Section 544.5, subdivisions 6 and 7 of Part 544.

(b) Section 542.2 of Part 542 of the Board's Rules.

The first of these sections refers to two provisions of the form of By-laws contained in Charter K, the form of charter prescribed by the board and adopted by respondent Association. The two provisions of the By-laws, subdivisions 6 and 7, read as follows:

> "6. *Resignation of directors.* Any director may resign at any time by sending a written notice of such resignation to the office of the association delivered to the secretary. Unless otherwise specified therein, such resignation shall take effect upon receipt thereof by the secretary. More than three consecutive absences from regular meetings of the board of directors, unless excused by resolution of the board of directors, shall automatically constitute a resignation, effective when such resignation is accepted by the board of directors.
>
> "7. *Powers of the Board.* The board of directors shall have power—
>
> (a) To appoint and remove by resolution the members of an executive committee, the members

of which shall be directors, which committee shall have and exercise the powers of the board of directors between the meetings of the board of directors;

(b) To appoint and remove by resolution the members of such other committees as may be deemed necessary and prescribe the duties thereof;

(c) To fix the compensation of directors, officers, and employees; and to remove any officer or employee at any time with or without cause;

(d) To extend leniency and indulgence to borrowing members who are in distress and generally to compromise and settle any debts and claims;

(e) To limit payments on capital which may be accepted;

(f) To reject any application for savings accounts or membership; and

(g) To exercise any and all of the powers of the association not expressly reserved by the charter to the members."

It should be noted that By-law subdivision 6 above refers only to *resignation* of directors and is utterly immaterial to the charge that the directors profited privately from selling proxies and directorships. Subdivision 7 above refers to the *powers* of the board and again says nothing whatsoever as to the fiduciary obligation of directors not to sell proxies and directorships and to keep the moneys for themselves. The claim in petitioner's second cause of action is a claim which falls within an ancient tradition. It was stated in *Securities and Exchange Commission v. Insurance Securities* (C.A. 9, 1958), 254 F. 2d 642, 649 as follows:

"It is a general principle of equity that a personal trustee cannot sell his office nor may this be done by a corporate officer or director . . . a member of a class who assumes to exercise or enforce a class right may not sell it for his own profit . . . directors of a solvent corporation may not take over for their own profit an opportunity available to the corporation . . . the president, director and dominant stockholder of a corporation may not sell a controlling stock interest in the corporation to outsiders where the result would be to deprive the corporation of opportunities for gain for controlling distribution to such outsiders. *Perlman v. Feldmann* (C.A.2d 1955) 219 Fed. (2d) 173.

"The cited cases exemplify two well established principles of equity. One of these is that a person, trustee, corporate officer or director or other person standing in a fiduciary relationship with another may not sell or transfer such office for personal gain.

"The second principle of equity exemplified in cited cases is that a person occupying a fiduciary relationship with another will not be permitted to exploit such relationship for personal gain, and in such a manner as to deprive the other of assets to which he is entitled."

It defies logic to find in subdivisions 6 and 7 above any language which regulates the fiduciary duties of directors and officers of a federal savings and loan association to the association or its members.

The second section of the rules cited by petitioner reads as follows:

"§542.2 *Hearings. Any person who has made an application or petition to the Board pursuant to any provision of Parts 543, 544, 545, or 546 of this subchapter may request a hearing thereon provided such application or petition has been denied or disapproved by the Board.* At any time after the filing of any such application or petition and before consideration thereof by the Board, any interested person may request a hearing upon such application or petition. *The Board may order a hearing in connection with the consideration of any matter arising under any provision of the rules and regulations in this subchapter, whether or not any* request *therefor has been made by any person.* The Board may deny any request for, or dispense with, any hearing for which this section provides when, in its judgment, no need therefor exists." (12 C. F. R. Chapter V, Subchapter C, Section 542.2)

We stated in the petition and repeat here that neither the first or third sentences of Section 542.2 have *any reference to the claims in petitioner's Second Cause of Action.* The first sentence relates to applications or petitions pursuant to any provisions of Sections 543, 544, 545 or 546 of the Board's Rules. As we have noted above, there is nothing in any of these parts which relates to the breach of fiduciary duty, asserting the liability of former directors of an association for that breach, or which touches the consideration of any of the issues related thereto. Respondents have not controverted this contention. Similarly, this claim is not a "matter arising under any provision of the rules or reg-

ulations in this sub-chapter" because the Board has not adopted any rules or regulations covering the substantive liability of the parties or the relief which is involved in this claim.[4]

We noted the following facts in the petition as respects the act and the board's regulations thereunder:

1. There is no provision for the board to bring any action against former directors of an association to recover moneys for breach of fiduciary duty.

2. Sec. 1464(d)(1) does not contain any provision for the board to bring any action against former directors for any relief whatsoever.

3. The power of the Board as to the matter of breach of fiduciary duty is confined by 1464(d)(1) to the power "to enforce this section and rules and regulations made hereunder." The board has not adopted any rules or regulations to apply to the fiduciary duties of directors and it certainly has not purported to regulate the sale by directors of proxies or directorships.

4. The board cannot enforce regulations which it has not adopted or published. The Administrative Procedure Act forbids it.

5. In 30 years of administering the act, there was not a single case of assertion by the board of liability against anyone other than the association.

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[4]As noted in the petition, the court below declined to make an analysis of the provisions of the Board's Rules but relied entirely upon the proposition that the Board had "broad and comprehensive powers". But the Board has not exercised its powers as respects petitioner's claim and, in fact, is not *given* the power to sue former directors or to recover from them money relief arising from their breach of their fiduciary obligations.

6. Every statutory provision for hearing, including service, notice, venue and costs, designates the parties as the board and the association.

Respondents have not refuted or disputed any one of the foregoing propositions. The conclusion that there is no actual or arguable jurisdiction at least as respects petitioner's second cause of action is therefore indisputable.[5]

III.

The Pendency of the Declaratory Relief Action in the Federal Court in the Southern District of California and the Pendency of Petitioner's Action in That Court Do Not Render the Pending Petition Moot.

It is clear from the brief filed by respondents Webb that they continue to retain in excess of $1,500,000.00 received by them in connection with their sale of directorships and proxies for Beverly Hills Federal Savings and Loan Association. These respondents do not assert that they have paid over these funds to the Association. It is clear, therefore, that these claims made by petitioners in their complaint are not and cannot be moot.

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[5]At pages 18 through 21 of the petition, petitioners cited five decisions of this Court which establish criteria for rejecting or requiring an alleged administrative proceeding as a condition of judicial action. Those cases hold (1) that if the asserted remedy is based on an inapplicable regulation, or (2) would result in a determination which would be void as to the parties involved, or (3) requires a hearing which will not bind the real parties in interest, or (4) is based upon a remedy which is uncertain, that exhaustion of such remedies is not required. As we have noted above: (1) There are no applicable regulations at least to petitioners' Second Cause of Action; (2) any determination by the Board as to recovery of moneys against former directors would be patently void; (3) petitioner and the former directors who are the real parties in interest in the action would not be bound by any determination of the Board; (4) to say the least, the remedy is uncertain. Respondents have not met any of these contentions.

It is also clear from respondent's brief that petitioners have not been permitted to proceed with their action to assert the right to recover from the Webb respondents for their breach of fiduciary duty. Thus, as to this issue, the dispute is not and cannot be moot.

It is true that petitioners have by every lawful means possible sought to protect the right of the members of the Association to recover from the former directors of the Association the moneys which rightfully belonged to the assured. Petitioners assert, and with all due deference submit, it is *undeniable* that Section 1464 (d)(1) does not give the Board the power to sue former directors for money for breach of fiduciary duty. Petitioners' attempt in the action cited above to make that point and to intervene for the purpose of having in the action parties who could recover has been, to this point, denied. If petitioners are correct as to the lack of jurisdiction in the Board, then the federal proceeding cannot bring the relief to which the members of the Association are entitled. It is only in *this action*, and only if this Court grants certiorari, that this relief can be assured. Thus, far from "mootness," the facts which petitioners brought to the attention of the courts below and to this court as to the other proceedings, emphasize the urgency of the determination of the questions presented in this petition.

Conclusion.

The question in this case involves the rights of hundreds of thousands of depositors of Federal Savings and Loan Associations to preserve their equity in an Association by judicial relief without the necessity of Washington litigation. The enforcement of fiduciary duties

of directors is an every-day, garden-variety function of state courts. Agency expertise is completely irrelevant; delays in the protection of these rights is absolutely unconsciable. The imposition of costs for Washington litigation is completely unjustified. The asserted requirement for statutory exhaustion finds no support in the statute.

Respondents cannot deny and do not deny that the question is important and that only this Court can decide it.

The petition for certiorari should be granted.

Respectfully submitted.

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